



EUROPEAN COMMISSION

Directorate General Internal Market and Services

FREE MOVEMENT OF CAPITAL, COMPANY LAW AND CORPORATE GOVERNANCE
Company law, corporate governance and financial crime

Brussels, 17 December 2010

FEEDBACK STATEMENT

**SUMMARY OF RESPONSES TO THE CONSULTATION BY
DG INTERNAL MARKET AND SERVICES**

ON

**THE MODERNISATION OF THE TRANSPARENCY
DIRECTIVE (2004/109/EC)**

1. GENERAL REMARKS ON CONSULTATION PROCEDURE AND FEEDBACK

On 28 May 2010, the European Commission (DG Internal Market and Services) launched a public consultation on the modernisation of Directive 2004/109/EC (Transparency Directive)¹.

The Commission also adopted in May 2010 a Report on the operation of the Directive and a related staff working document on emerging issues². This report (i) describes the impact of the Transparency Directive and how it has been complied with and (ii) presents the main issues emerging from its application.

Five years after the entry into force of the Transparency Directive, its rules are considered to be useful for the proper and efficient functioning of the financial markets and for making informed investment decisions. Despite this positive general perception of the Directive, there is evidence that some inefficiency still remains that hampers investment decisions and diminishes investor confidence.

In this context, the public consultation launched by the Commission aimed at gathering quantitative and qualitative evidence on impacts, costs and benefits resulting from the requirements of the Transparency Directive as well as views on possible amendments to these requirements.

The issues which the Commission invited views and evidence on included:

- Attractiveness of regulated markets for smaller listed companies;
- Ways to improve the transparency regime of major holdings of voting rights;
- Possible ineffective application of the Transparency Directive due to diverging national measures and/or unclear obligations in the Directive.

The deadline for responses to this consultation was 23rd August 2010. The following contributions have been received: 94 from organisations, 17 from public authorities (including a European body and a private organisation entrusted with a public function) and none from individual citizens.

¹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, *OJ L 390*, 31.12.2004, p. 38–57

² Report from the European Commission to the Council the European parliament, the European Social and Economic Committee and the Committee of the Regions on the Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, SEC(2010)611.

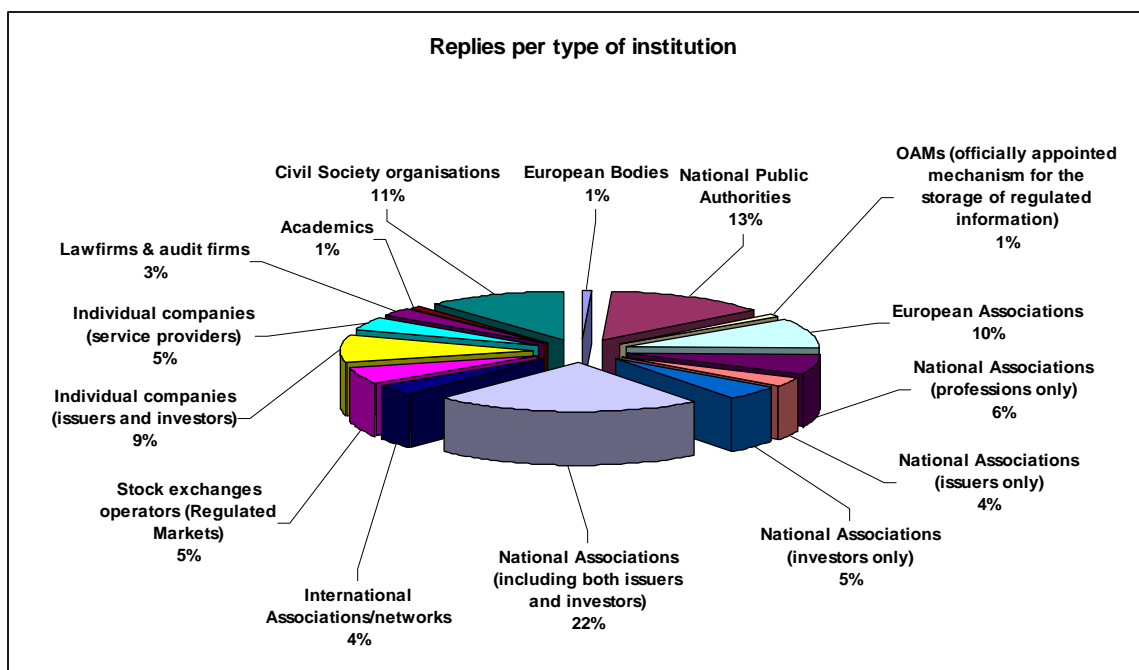
2. OVERVIEW OF RESPONSES TO THE CONSULTATION

The consultation was launched on 28 May 2010 and closed on 23 August 2010³. Responses were invited from all interested parties. 111 answers were received from a wide range of professional representatives and public authorities.

Figure 1 shows the status of organisational respondents, classified into several categories.

Figure 1 – Replies received, by type of institution

Type of institution	Replies	Type of institution	Replies	Type of institution	Replies
European Bodies	1	European Associations	11	Stock exchanges operators (Regulated Markets)	6
National Public Authorities	15	National Associations (professions only)	7	Individual companies (issuers and investors)	10
OAMs (officially appointed mechanism for the storage of regulated information)	1	National Associations (issuers only)	4	Individual companies (service providers)	5
		National Associations (investors only)	5	Law firms & audit firms	3
		National Associations (including both issuers and investors)	25	Academics	1
		International Associations/networks	4	Civil Society organisations	13
Total					111



³ Replies received after that date have also been considered.

3. ANALYSIS OF RESPONSES

3.1. Methodological issues

The feedback statement provides a broad summary of responses to each of the specific questions raised in the consultation paper. It is a factual document which presents the results of the consultation and does not announce any policy options.

During the analysis of the responses, opinions have been categorized into 'yes/no' categories of answers where possible. The majority of respondents have also provided qualitative commentaries to supplement or nuance their 'yes/no' answers. The explanations have been grouped under a number of sub-headings to enable a more detailed analysis of respondents' views.

Some interpretation of the replies received has been necessary. A number of respondents did not provide replies to the questions but general statements on issues covered by the questions. Those contributions have been interpreted in order to allocate the views expressed to the relevant questions. When replying to certain questions, some answers were unclear as to the allocation of a "yes" or "no" and required interpretation. Replies to some questions were more relevant or also relevant for other questions. As a result, those views have also been taken into account in the analysis of these other questions. Respondents raised similar or identical issues in the replies to more than one question. Where possible, the analysis of these views has been grouped under only one question in order to facilitate understanding. This is particularly relevant for the following issues: several respondents raised the subject of the identification of shareholders which, for the purposes of this feedback statement, will be treated under question 18 (and not under questions 15 or 24); many respondents raised the need to clarify the rules on stock lending which, for the purposes of this feedback statement, will be treated in the Annex 2.

It is noted, however, that this interpretation may not reflect fully or effectively the opinion of the respondents.

It also should be noted that, for the preparation of the statistics reflected in this paper, all responses have been given equal weight. In addition, some respondents who provided individual contributions indicated that they also contributed to, or supported a submission by a professional association of which they were members.

A number of respondents have answered only a limited number of questions which they considered to be of particular relevance and did not provide a response to other questions.

3.2. Detailed analysis

I. Attractiveness of Regulated Markets for small listed companies (questions 1 to 10)

<p><u>General issue.</u> Is it desirable to enact a differentiated regime for small listed companies in the rules applying to regulated markets?</p>
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The consultation paper did not contain a specific question on the merits of enacting a differentiated regime for small listed companies in the rules applying to regulated markets. However, nearly half of the respondents provided an opinion on this issue. One third supported the possibility to enact a differentiated, more proportionate, regime for

small listed companies regarding the rules applying to regulated markets so that these markets remain attractive for small listed companies. It was argued that the administrative burdens and associated costs for small listed companies could be reduced without affecting the level of transparency or the quality of the information disclosed. The US was mentioned as an example. Some respondents supported the differentiated regime provided that investor protection and soundness of the markets were not adversely affected.

On the other hand, two thirds of the opinions provided opposed this idea on the basis that the same disclosure requirements should apply to all issuers on regulated markets irrespective of their size. They were of the opinion that regulated markets were a guarantee for certain quality standards, which must not be undermined with the creation of sub-markets or segments according to the size of issuers.

Several replies mentioned that exchange-regulated markets (also known as junior, alternative, growth or second-tier markets) were more suitable for smaller companies and that regulatory solutions to increase the attractiveness of this type of market would be preferable. Smaller companies should have the choice of listing first on these smaller markets and then migrating to major markets as they grew.

It was also outlined that EU legislation should recognise that there are and should be different types of capital markets in the EU, with different regulatory intensity: (i) exchange regulated markets with a light-touch regime; (ii) regulated markets with common standards for all issuers; and (iii) premium segments, within regulated markets, voluntarily joined by issuers, which may include regulatory add-ons defined by the stock exchanges.

All respondents who expressed an opinion on this general issue called on the Commission to conduct a holistic review of the burdens for small listed companies and of the appropriate and beneficial solutions in terms of the regulatory approach for primary markets (both regulated markets and exchange-regulated markets). One respondent also indicated that the development of a more vibrant venture capital and private equity sector in Europe could, in many cases, represent a more viable source of funding than public equity markets for smaller companies.

<p><u>Question 1 – Impact of the Transparency Directive on the attractiveness of regulated markets for small listed companies.</u> Do the Transparency Directive obligations for issuers (e.g. disclosure of annual and half-yearly financial reports, quarterly information etc.) impact on the decisions of small listed companies to be listed on or to exit regulated markets (e.g. do they act as an entry barrier)?</p>

Respondents' views diverged on this issue.

A number of respondents considered that the transparency requirements, while implying a certain burden, were not a critical consideration in a company's decision to get listed on a regulated market or a barrier to entry. In their view, the benefits of the requirements provided by the Transparency Directive outweighed the related costs. By requiring firms to provide more complete, clear and harmonized financial information, comparability between issuers was facilitated and investor awareness and confidence increased. It also encouraged better organization of issuers, which was particularly relevant in the case of small listed companies. In addition, several respondents believed that the most significant costs were caused by legislative requirements other than the Transparency Directive.

On the other hand, some respondents were convinced that the cost of ongoing disclosure requirements imposed by the Transparency Directive created an incentive for smaller companies to avoid listing on regulated markets unless this could be justified by significant benefits in terms of access to external sources of funding, which were not always achieved.

Many replies pointed out that an increasing number of issuers had recently left or considered leaving regulated markets in order to decrease their compliance costs. However, while the costs of the transparency obligations were often cited by small listed companies themselves as the main reason for delisting, other respondents underlined that a number of factors contributed to the delisting phenomenon: small free float affecting the trading and the liquidity of the equity issued by smaller companies, insufficient performance, buy-out transactions, mergers etc.

Finally, some respondents had difficulties to evaluate the real impact of the requirements of the Transparency Directive since they could not be seen in isolation from other obligations to be complied with by issuers in order to be listed on regulated markets.

Question 2 – Costs for smaller listed companies. Which are the most important costs for small listed companies associated to compliance with the Transparency Directive (e.g. cost of preparing the accounts, auditing costs, legal costs, cost of making public the information etc.)?

Most of the respondents provided qualitative answers. Some outlined that the main cost was the time that board and senior management spent in complying with transparency related requirements rather than in directing the business (opportunity cost). Others suggested that the preparation of the accounts (IFRS) and the related auditing costs resulted in a heavy burden for small listed companies because they often had limited in-house financial expertise and it was more difficult for them to comply with the short publication deadlines of the Transparency Directive.

In addition, legal compliance costs, translation (into English) costs and publication costs were also mentioned as important as well as other requirements (corporate governance rules, regular reporting obligations, advertising, financial marketing, disclosure of management transactions and shareholdings) which required listed companies to incur costs linked to the hiring of specialists including lawyers, accountants and investor relation teams, often in amounts well beyond those associated with public information reporting.

Some respondents also underlined that important costs arose from national rules, such as the obligation to prepare quarterly financial reports or to publish regulated information in certain media.

For the majority of respondents, the main problem appeared to be the level of costs as compared to the turnover of the small issuers.

In addition, some respondents considered that the benefits of transparency outweighed the costs and that the requirements were not disproportionate.

It was mentioned that some of the costs would have been incurred anyway even if the company wanted to access capital without being listed on a regulated market (e.g. via private equity investment).

Question 3 – Potential diminution of cost for small listed companies. What changes of the Transparency Directive will bring important reductions in costs for small listed companies? [see also questions 7 and 8]

Views of respondents were split. About half of those responding believed that the margin of manoeuvre for reducing the requirements without lowering transparency standards was limited and, consequently, changes to the Transparency Directive could not significantly reduce costs for small listed companies.

The remainder of respondents believed that some cost reductions could be achieved without necessarily affecting the level of transparency necessary to protect investors. The following ideas were advanced: streamline disclosures; more flexible deadlines for publication of financial reports; no obligation to produce quarterly financial information either definitively or during the first 3 years of listing; allow issuers to decide on the optimal interval of regular reporting (e.g. two or three times a year); use a common standard reporting format and common language (XBRL); use non-binding uniform templates for reports (including the narrative sections); make regular annual financial reports closer to prospectuses in format and content; avoid gold plating (e.g. in relation to the audit of half-yearly financial reports).

Question 4 – The lower visibility of smaller listed companies. How does the visibility problem materialise (e.g. lower attention of analysts, lower investment levels, lower trading etc.) for (objectively) well performing small companies?

Respondents that provided an answer to this question in general agreed that there was a visibility problem for small listed companies' equity. This lack of visibility generally resulted in lower investment levels, which remained very much national, lower trading, lower attention of analysts, in particular across borders, as well as lower attention from media.

Concerning the low investment and trading levels, investment in small companies was viewed as much riskier than in large ones due to the lower liquidity and therefore greater volatility in the share price. Also, information asymmetries resulted in higher due diligence costs - which in some cases may exceed return on investment - for investors willing to invest in smaller companies. One respondent in particular explained that investors did not have all the necessary information to enable accurate assessment of risks and make optimal investment decisions, as it was harder for investors to obtain reliable information on smaller businesses.

For some respondents, however, low investment and trading activity could also be related to factors other than visibility. For instance, for large funds, investment in even strongly outperforming small listed companies was unlikely to make much of an impact on the fund's overall performance. In order to gain material exposure to small companies, their holdings would have to be relatively large. However, it could be difficult for fund managers to take significant positions in small listed companies due to the impact that this would have on the share price. This also carried not only the risks that can be inherent in a small company (earlier stage in a growth cycle, for example) but also illiquidity risks (not being able to sell the holding easily). All of this had to be factored into the investment decision.

One respondent indicated, however, that there were institutional investors specialised in investing in small listed companies.

Concerning the lower attention of equity analysts, respondents were of the opinion that lack of turnover in small listed companies stocks made it difficult to generate brokerage commissions. As a result, relatively few brokerage research and trading resources were dedicated to smaller listed companies. This resulted in a vicious cycle and raised the question of the viability of the small caps equity research model.

Several replies linked the question of visibility to how information is disseminated and raised the issue of the bottleneck of the half-yearly financial reports published at the end of August.

Other respondents believed that current provisions of the Transparency Directive on dissemination/storage of regulated information were unsatisfactory, since they intensified or, at least, failed to address the problem of the low interest shown by EU investors in smaller listed companies. In their view, the Transparency Directive should facilitate, to the maximum extent possible, an easy, low cost and non-discriminatory access to regulated information to all investors. Currently, small issuers were reluctant to spend more money to ensure wider dissemination of information considering the low cross-border attention they received.

Finally, some respondents called for a holistic review of the visibility problem, outside the Transparency Directive. Several respondents suggested that tax incentives should be applied to address the persistent market failures associated with equity investment in smaller listed issuers. By adjusting the risk reward of investment in smaller listed issuers, funds could be attracted to primary and secondary markets, supporting market liquidity and lowering the cost of capital.

Question 5 – Other cases reflecting low benefits. Are there, in your view, other cases reflecting low benefits for small listed companies resulting from disclosure obligations compared to larger listed companies?

Few replies were received to this question. For some respondents, the benefits to be gained through adequate disclosure were higher for small listed companies than for larger companies. Reducing information may deter some investors and was a particular problem for smaller companies, which may not have a well recognised track record or brand.

For other respondents, there were additional cases reflecting low benefits for small listed companies.

For example, most of the competitors of small listed companies were not listed on regulated markets. Providing too detailed information can have negative consequences and present competitive disadvantages for small listed companies.

Question 6 – Definition of a small listed company. What would be the optimal definition of a "small listed company" in the context of regular (i.e. after the admission to trading of the securities) transparency requirements? *i) for issuers of shares, those companies with*

a market capitalisation below a certain threshold such as €100 Million⁵, €250 Million⁶ or other (please specify the threshold); ii) for issuers of shares, those companies with a market capitalisation below a certain percentage (e.g. 60%) of the average capitalisation of a company in the regulated market where the company is admitted to trading (please specify the percentage); iii) for issuers of shares, those companies with a market capitalisation below a certain percentage (e.g. 60%) of the average capitalisation of a company in the regulated market(s) of the home Member State of the company (please specify the percentage); iv) for issuers of debt securities only, those companies having outstanding debt securities below a certain threshold (please specify the threshold); v) for issuers of debt securities only, those companies having a turnover below a certain threshold (please specify the threshold); vi) other.

There was no consensus among respondents to this question.

Slightly more than one third who answered supported a definition of small listed company based on the market capitalisation. This criterion was considered to be simple and straightforward, although some kind of transitional arrangements for companies crossing the thresholds as a result of changes in capitalisation would need to be established. Concerning the threshold itself, views were split. The following capitalisation thresholds were mentioned: the Prospectus Directive⁷ threshold; €100M; €150 M; €250M; €400M; €750 M; €1 billion; the thresholds used by stock exchanges for the different market segments.

About one fifth of the replies would prefer to rely on a relative threshold, either by reference to the average (or median) capitalisation in the home Member State of the issuer or on the regulated market where the company is or intends to be listed. For example, using a 35% threshold of the **average** capitalisation in Paris would allow to capture in practice 75% of the issuers, which would otherwise represent only 4,4% of the **total** capitalisation in Paris. Several of these respondents suggested, however, leaving the question of the threshold to be decided at national level.

Few respondents addressed the question of the issuers of debt. One expressed preference for using a balance sheet threshold and another respondent for a mixture of the two criteria proposed in the question. Other replies expressed a preference for not touching the question of issuers of debt.

More than two fifths of respondents, however, opposed a definition of small listed company and provided arguments against the different solutions proposed in the question. They took the view that the proposed definitions would be impractical because of the volatility and the variations in the capitalisation of companies, which in turn resulted in legal uncertainty, investment confusion, increased costs for issuers related to

⁵ See the definition of "*company with reduced market capitalisation*" in the context of the on-going review of the Prospectus Directive (for instance, in the Council's compromise text of February 4, 2010 <http://register.consilium.europa.eu/pdf/en/09/st17/st17451-re01.en09.pdf>).

⁶ See the External Study (section 1 of the executive summary) which refers to a threshold of between 250 Million and 1000 Millions euros.

⁷ Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

monitoring the relevant thresholds as well as enforcement burden. It was also argued that these thresholds would not capture the company risk profile and would be difficult to apply to all markets, which could result in regulatory arbitrage.

Finally, some respondents suggested that if there were a definition of a small listed company which resulted in a different transparency regime, such listed companies should be allowed to “opt-out” from the differentiated regime and to continue applying normal standards. Another respondent cautioned against the possible proliferation of different definitions of a small listed company in different EU directives.

Question 7 – Potential diminution of cost for small listed companies if changes to the Transparency Directive were to be adopted.

Question 7.1 – If a differentiated regime for small listed companies is added to the Transparency Directive with a view to reduce the compliance costs of those companies, would it be desirable to prevent Member States/regulated markets from imposing in national law/listing rules more stringent or additional obligations on small listed companies?

A large majority of respondents that provided an answer to this question were not in favour of a maximum harmonisation approach if a differentiated regime for small listed companies were added to the Transparency Directive. These respondents considered desirable that Member States or regulated markets operators would be able to set more stringent or additional obligations to small listed companies, in particular because of the need to adapt the market to the local conditions. In their view, imposing maximum harmonisation could result either in lowering the existing high level standards in certain regulated markets or imposing a significant new burden in those countries that were currently only applying the minimum requirements of the Transparency Directive. Some of these respondents however considered that only regulated markets operators, and not Member States, should enjoy the capacity to impose stricter requirements.

Only a small minority of respondents favoured a maximum harmonisation approach because, in their view, the current regulatory burden was partly caused by national gold plating.

Question 7.2 – Do you think that an extension of the deadline for the publication of financial reports would imply a reduction in legal, auditing or other type of costs? Please provide evidence supporting your answers (e.g. how much the cost would be reduced depending on the extension of the deadline)?

Respondents to this question provided qualitative rather than quantitative views on costs, with a small minority not providing any opinion on costs at all.

About half of the respondents did not believe that an extension of the deadline for publication of financial reports would result in any significant cost reduction. Some of these respondents, however, appreciated the flexibility that could result from an extension of the deadline for the publication of half-yearly reports from two to three months, so as to better organise the necessary work, relieve administrative complexities, improve the quality of the output and secure the services of auditors.

Some other respondents believed, on the contrary, that extending the deadline of publication of financial reports, in particular, half-yearly, would result in a reduction in

costs. The following types of costs which could be reduced were mentioned: the burden on boards and senior management (opportunity cost); accounting costs (e.g. less need to hire external staff/consultants in certain periods for accounting needs because workload of internal staff would be better spread throughout the year); auditing costs (e.g. easier for auditors to cope with the work); extra hours (both of in-house staff and of external auditors).

In addition to the cost issue, some respondents expressed negative views on the possibility to extend the deadline for publication of financial information. Late publication of financial reports could lead to outdated information which was less valuable to the market and would increase the risk of market abuse. It was also argued that a better way for issuers to better allocate internal resources was to adjust their accounting year.

Some other respondents considered that such extension of the deadline should benefit all listed companies, not just small ones.

Question 7.3 – Do the various rules requiring the disclosure by listed companies of reports of narrative nature⁸ bring significant costs/operation complexity for small listed companies (e.g. legal, account preparation, auditing, other type of costs)?

Only a small number of respondents provided an answer to this question.

Around half considered that the various rules requiring the disclosure by listed companies of narrative reports brought significant costs/operation complexity to small listed companies. The opportunity cost related to the time of boards and senior management was again particularly highlighted, since there was little scope to delegate the task to more junior staff. One reply mentioned that the bulk of the cost consisted of understanding what each requirement meant, how much text was required, what should be the content and what degree of detail was required. Narrative reports needed also to be checked, proof-read and compared to other narrative reports, which generated a significant amount of work for companies. Additionally, one respondent mentioned that auditors and lawyers were increasingly involved in the preparation of narrative reports due to the growing complexity, which contributed to increasing the related costs. The following disclosure requirements were identified as complex for small listed companies: preparation of interim management statements, compliance with the corporate governance requirements, corporate social responsibility disclosures.

⁸ Those narrative reports (see Annex to this questionnaire for the legislative references) are:

- the annual management report (Article 4(5) TD), which refers to Article 46 of the Fourth Company Law Directive or to Article 36 of the Seventh Company Law Directive, and integrates disclosure obligations relating to environmental and social data;
- the corporate governance statement as referred to in Article 46a of the Fourth Company Law Directive and Article 36(2) of the Seventh Company Law Directive, to be included in the annual management report;
- the information requested in Article 10 of the Takeover bids Directive, to be included in the annual management report;
- the disclosure on remuneration of directors (provided it is not integrated in the corporate governance statement);
- the interim management report (Article 5(5) TD); and
- the interim management statement (Article 6(1) TD);

The other half of the respondents was not convinced nor had evidence of any significant costs/operation complexity for small listing companies arising from the various rules requiring the disclosure by listed companies of narrative reports that would warrant a reduction in the reporting requirements. Some respondents said that removing disclosure requirements would not be prudent from a transparency and investor protection perspective and/or that the benefits of transparency outweigh the costs. Others pointed out that investors do not expect the same volume of disclosure from small companies as from the larger, often more complex, companies. Some replies also suggested leaving this issue to national rules.

Question 7.4 – Would you see benefits from integrating in the Transparency Directive the disclosure obligations mentioned in question (7.3⁹) which are currently in different directives?

A slight majority of respondents to this question would see some benefits in integrating in the Transparency Directive the disclosure obligations concerning narrative reports that are currently dispersed in different directives. Some of the respondents pointed to the fact that one set of rules would be more user-friendly for issuers and could make clear that the responsibility for monitoring the disclosures would remain with a single competent authority. However, it was also argued that the perceived improvements might be limited and that everything would depend on how Member States would implement the obligations.

The remaining the respondents could not see any particular benefit in integrating all narrative disclosure obligations in the Transparency Directive. For some, it would not be appropriate to include corporate-governance related disclosures in the Transparency Directive, except for the corporate governance statement which is part of the annual financial report. For others, integration of all narrative disclosures in the Transparency Directive would have a negligible impact. Such "relocation" could confuse market participants rather than being helpful: overall, the "location" of an obligation was irrelevant as it was the content that causes compliance costs and not where the respective rule is codified.

Finally, one respondent mentioned that a consultation on the narrative reporting framework had been recently launched in the United Kingdom.

Question 7.5 – If the Transparency Directive provided for maximum harmonisation (no national add-ons) of the content of narrative reports referred to in question (7.3) for small listed companies, would this imply a reduction in legal, auditing or other type of costs?

Few respondents provided views on costs. A few of them considered that some cost reduction could be achieved. In particular internal administrative costs could be reduced because of the possibility to introduce more automation in the process. But most of the respondents could not see scope for cost reductions arising from maximum harmonisation of narrative reports for small listed companies. On the contrary, one respondent underlined that maximum harmonisation across Europe on the content of narrative reports would increase financial reporting obligations and hence compliance

⁹ The consultation paper wrongly referred to question 8.3 instead of 7.3. Some respondents expressed they were unable to reply to the question because of the wrong cross-reference. Others interpreted the cross-reference as referring to question 7.3, which as the intention of the consultation paper.

costs for a large portion of small listed companies which were listed on those regulated markets which did not currently impose their own additional reporting obligations beyond the minimum EU requirements.

Most of the respondents that provided views on the merits of such maximum harmonisation opposed the idea. It was highlighted that the quality of the narrative reporting was crucial for investors. If the threshold for the content were set too low in the hope of saving costs, this may have negative implications for investors, with subsequent long run negative effects on the share price and the cost of capital for the company. In this context, some respondents called for allowing markets to maintain their premium listings.

Question 7.6 – In case you think maximum harmonisation regarding the content of narrative reports referred to in question (7.5) is desirable, what do you think would be the best way? *i) non-mandatory ready-to-use templates regarding these narrative disclosures (which could be prepared for instance by CESR/ESMA); ii) more detailed rules in European law, either in the Transparency Directive or in delegated acts adopted by the Commission; iii) a combination of both.*

Few respondents provided an opinion on this question.

Most saw some value in the possible preparation of ready-to-use templates for narrative disclosures, provided they were not mandatory.

Only one respondent supported more detailed rules in EU law (either in the Transparency Directive or in implementing acts adopted by the Commission). Two respondents supported a combination of both options. Two replies suggested other options such as guidance work of the IASB.

Other respondents, however, were opposed to maximum harmonisation in this area. For instance, some considered templates for narrative disclosures to be particularly worrying and likely to result in box-ticking and "boilerplate" disclosures. This would be less informative to investors and contrary to the objective of disclosing comprehensive information. It was also argued that favouring form over content was not the best way to improve regulation. One respondent explained that more detailed rules in EU legislation could result in more regulation, less flexibility and higher costs of compliance.

Question 7.7 – Concerning question (7.6), could you provide a specific reply regarding the disclosure of environmental and social data requested in Article 46(1)(b) of the Fourth Company Law?

Few respondents provided a reply to this question.

Several respondents supported the view that the rules on disclosure of environmental and social data should not be integrated in the Transparency Directive or that such rules should not be changed. Others underlined that this type of disclosure was often sector specific and difficult to harmonise.

Some respondents, however, supported the idea of maximum harmonisation or at least non-mandatory ready-to-use templates, in particular for numeric data. Other replies favoured more guidance.

One respondent underlined that sector-specific key performance indicators needed to be developed in order to ensure that issuers disclose comparable data on a broad range of potential risks.

Question 8 – Diminution of cost for small listed companies vs. diminution of transparency to the market.

Question 8.1 – Is it possible to apply lighter transparency obligations for small listed companies without a corresponding significant diminution of transparency provided to the market?

The majority of respondents that provided a reply to this question believed that a differentiated regime for small listed companies would result in a significant diminution of transparency provided to the market and a perceived gap in investor protection. They notably highlighted that reducing the frequency and the amount of information to the market could result in lower interest from investors and a general reduction of confidence, which *in fine* would be detrimental to small listed companies. Lighter transparency requirements could create a second-tier market which could be abandoned by investors seeking higher standards of quality. A minority of respondents believed nevertheless that already today various market segments with different reporting requirements existed without necessarily affecting the overall level of transparency to investors. Different levels of obligations could be beneficial provided this is clear to investors, as has been done already in the US. It would allow streamlining disclosures and reducing the flood of information which is currently difficult to manage for analysts and investors. In any case, any price sensitive information had to be disclosed under the Market Abuse Directive, thus avoiding disclosure gaps. Also, lightening the obligations did not prevent small listed companies from providing more information if investors/stakeholders so requested.

Other respondents referred to the need to look at the methods for dissemination of information: some supported posting information on websites (which allegedly could result in savings of €5000/10000 per issuer), while one respondent suggested to use regulatory information services to disseminate information.

Question 8.2 – If the obligation to disclose quarterly financial information¹⁰ was waived for small listed companies, would this result in an unreasonable diminution of transparency?

The majority of respondents that provided a reply to this question believed that waiving the obligation to disclose quarterly financial reports or interim management statements (hereinafter quarterly financial information) would result in an unreasonable diminution of transparency. The main arguments were that: (i) quarterly financial information was useful and valuable to the market and provided visibility to small listed companies; (ii) it was not too difficult to comply with the obligation to prepare an interim management statement which was a proportionate requirement; (iii) reducing the amount of information to the market could result in less appetite from investors to invest in those companies and also increased the risk of market abuse; (iv), transparency rules in regulated markets should not be determined by size of companies. Some respondents,

¹⁰ Either quarterly financial reports or interim management statements as referred to in Article 6 TD.

however, could support some flexibility regarding less volatile sectors and/or newly listed small companies (e.g. temporary waiver).

A minority of respondents considered that the publication of quarterly financial information could be waived for small listed companies. The publication of this kind of information was rare in some EU markets before the implementation of the Transparency Directive in 2007 without there being a perception that securities markets suffered from a lack of transparency. Moreover, some respondents were of the view that benefits resulting from disclosure of quarterly financial information were negligible for small listed companies and that such disclosure contributed to short-termism in company decision making. In addition, quarterly financial reports or interim management statements would not disclose any sensitive information to the market in terms of price movements, since any material information should have been announced to the market in any event according to on-going disclosure requirements provided by the Market Abuse Directive. Some respondents expressed preference for giving freedom to companies to decide whether to publish quarterly financial information: if investors demanded this information, companies would publish it, if they did not, there was no point in obliging the issuer to produce it.

Some respondents specifically stated that quarterly financial reports should not be imposed (e.g. they contribute to short termism) and that issuers should be allowed to continue publishing interim management statements instead. In this regard, one respondent outlined that issuers should maintain freedom and flexibility as to the content of interim management statements and that there was no need to clarify the requirements of Article 6 of the Transparency Directive.

If the requirement to disclose quarterly financial information were waived in EU law, some respondents were of the view that regulated market operators should be allowed to require issuers to disclose such information, at least for the premium segments.

Question 9 – Addressing the lower visibility of smaller listed companies

Question 9.1 – Do you think that measures at EU level (including possible changes to the Transparency Directive) can help solving the lower visibility of smaller listed companies?

The majority of respondents to this question considered that measures at EU level (including possible changes to the Transparency Directive) could not really help solve the problem of lower visibility of smaller listed companies or would do so only marginally. The primary obstacle to greater visibility of smaller listed companies was the structure and incentives of the institutional asset management industry. According to one respondent, small listed companies often operated within a single country which, coupled with the language barriers that exist between EU countries, often resulted in difficulties to create investor appetite across Europe. Another respondent argued that in small countries, companies, even if small in absolute terms, are sufficiently attractive on the local market so that their capital issuances are over-subscribed.

On the other hand, a minority of respondents considered that measures at EU level (and at national level) could improve visibility of small listed companies. Among those, one respondent suggested a role for EU agencies in addressing the issue of lower visibility of these companies, as part of a broader strategy for small listed companies in the EU. Another respondent expressed support for measures proposed in the Demarigny report, in

particular regarding the use of special IFRS for SMEs as an accounting standard for small listed companies.

One reply highlighted that any EU measure, however, should be without prejudice to other market driven initiatives, which should be also targeted, preferably as a primary approach. For instance, issuers should use all possibilities offered by the current framework to enhance their visibility, such as choosing a financial year different from the calendar year.

Finally, one respondent expressed a negative opinion about the possible creation of a pan-European trading platform for small listed companies.

Question 9.2 – What type of measures at EU level could help solving the visibility problem of small listed companies? i) *The Transparency Directive should contain differentiated rules for small listed companies regarding timing and/or methods for the disclosure and dissemination of information;* ii) *there are rules in other EU directives (e.g. prudential requirements) and/or national law (e.g. tax law) which discourage financial analysts and intermediaries' interests in small listed companies which should be modified;* iii) *financial analysts and intermediaries should get incentives to interest themselves in small listed companies;* iv) *other.*

Several respondents provided a specific reply to this question. However, there was some overlap with the general comments that many respondents provided on the merit of having a differentiated regime for small listed companies. The summary of the replies to question 9.2 therefore focus on whether some measures could help solving the visibility problem of small listed companies and not on the merit of adopting them.

Concerning possible differentiated rules, many respondents supported extending time-limits for publication of half-yearly reports to either 11 weeks or three months, instead of the current two-month time-limit. Some respondents would support such extension provided it was applied to all issuers. However other views suggested that instead of extending the deadline for publication, issuers should adjust their financial yearend to avoid disclosing their half-yearly reports all at the same time. It was argued that disclosure of financial information which was evenly distributed throughout the year would encourage users of financial information to pay more attention to small companies, particularly if smaller companies were able to disclose regulated information at times when larger companies were not also disclosing information. This would also help to balance the workload of users of the information, the burden on information systems and prevent the currently recurring disruptions of the market. Another suggestion concerned the reduction of the frequency of financial reporting to 2 times (every 6 months) or 3 times (every 4 months) a year.

Respondents did not specifically address the issue of the impact of the prudential rules and tax laws on investment levels. However, some respondents agreed that it was of decisive importance to improve market conditions for investors focusing on small listed companies. A respondent was of the view that EU efforts should be directed at identifying the factors that caused institutional and retail investors not to invest capital in smaller listed issuers and to assess whether a regulatory response at EU level would be appropriate or desirable to address this factors.

Some ideas were proposed. One respondent supported initiatives that would foster a network of investors who understood the needs of small listed companies. Support was

also expressed for the creation of dedicated investment funds or new types of investment funds allowed to invest more in smaller issuers listed on exchange regulated markets. The need to provide tax incentives in order to encourage investors to allocate their investment to small listed companies was also mentioned: e.g. providing incentives to existing funds to invest a minimum amount in small listed companies would increase investment.

Dissenting views, however, were expressed that it would not be easy to transform the perspective of institutional investors with respect to investments in small listed companies. The development of a more vibrant venture capital and private equity sector in the EU was considered, a more viable source of external funding than public equity markets for smaller companies.

Some respondents were in favour of measures to incentivise brokers to conduct minimum research into small listed companies although the question of who should pay for such incentives was also raised. However, other respondents were opposed to this idea and questioned the existence of any market failure. It was explained that if there were demand for more detailed information on a specific small listed company, it was likely that a financial analyst would provide the required analysis. It was also argued that incentives to analysts would lead to market distortions. Furthermore, a stronger focus of analysts and intermediaries on small listed companies based only on incentives would be detrimental to investors, as intermediaries would act on inappropriate considerations and therefore misallocate funds.

Additionally, some respondents provided other suggestions. Some requested the Commission to undertake a more holistic review on this issue. One respondent explained, in particular, that small listed companies were a different asset class as compared to deeply liquid and frequently traded stocks. This should be taken into account when developing a policy to promote investment in these companies. This respondent supported a role for the EU agencies in setting a pan-European strategy with a clear vision for the smaller listed company segment, taking into consideration the key areas of enterprise, finance and macroeconomic policy, and argued that there was a need to create a "community" for the small listed companies sector as an asset class. Another respondent explained that small listed companies should engage more with the investor community and their agents.

Other respondents supported an EU legal framework for exchange- regulated markets. In their view, formalised support across Member States for markets dedicated to smaller companies would increase the profile of such businesses and help them attract investors.

Some respondents raised the question of the need to simplify the information dissemination model. Some of them suggested that publishing regulated information in English could provide broader opportunities for investments in smaller issuers, and one suggested allowing small listed companies to publish information in English only. One respondent thought that publishing regulated information on a website provided enough visibility for small issuers, although this view was not necessarily shared by other respondents who proposed a wider use of specialised service providers to disseminate information. Other respondents were of the opinion that the dissemination model of the Transparency Directive did not work well and that other solutions needed to be found: for instance, the dissemination system in Portugal was cited as an example by a respondent.

Finally, some respondents reiterated their view that the type of measures suggested in question 9.2 would not have a positive impact. For instance, one respondent claimed that these proposals would not resolve the current structural bias towards larger firms and that the current situation reflected in general the true value of small listed companies. Where those companies were undervalued, they would be more interesting to analysts and investors, therefore the natural balance would be restored. Another respondent questioned the EU competence in this matter, taking into account limited cross-border activity of many small listed companies.

Question 9.3 – Do you think that the development of an EU database¹¹ storing regulated information on all issuers of securities in the EU will facilitate research and create interest/result in greater attention in small listed companies by financial analysts, financial intermediaries and investors?

Respondents were split on this issue.

Almost half of respondents generally believed that the development of an EU database for storage of regulated information on all issuers of securities in the EU could facilitate research and result in greater attention to small listed companies from financial analysts, financial intermediaries and investors. However, (i) this should not be a stand alone initiative, but a part of a wider strategy for small listed companies; (ii) such database would need wide marketing, and be well organised to facilitate research; (iii) no additional cost on issuers should be imposed; (iv) the Commission should not be in charge of developing it; (v) push (media) systems would need to be maintained to reach investors; (vi) it should be accompanied by a convergence of substantive disclosure requirements and by a common format; (vii) it should be accessible free of charge or at very low price.

Another half of respondents conveyed the opposite message. They supported the existing situation with national databases or more disclosure of information on issuers' websites on the grounds that: (i) there was a significant risk that a pan-European project would be excessively costly and would duplicate or undermine the work being undertaken at national level; (ii) costs/drawbacks linked to the quality of information provided would largely outweigh hypothetical benefits; (iii) the US Edgar system which is similar to a pan-European database lacked flexibility; (iv) the development of research and analysis should be left to the market; (v) investors in small listed companies tended to be largely domestic and a central EU database may not help to increase investment into this category of listed companies; (vi) issuers should have the choice regarding ways to disseminate regulated information.

Some respondents thought nevertheless that, while a central storage database on all listed issuers of securities in the EU would not be of substantial benefit to smaller listed companies, such a central database or a single access point could be of benefit to the investor and analyst community.

One respondent suggested that it may be worth examining in a separate consultation if the US SEC model could be adapted for use in the EU.

¹¹ It could be a single EU database (such as an improved version of the ECB centralised securities database) or a network of national databases (i.e. the national officially appointed mechanisms referred to in Article 22 TD) allowing for multi-country searches.

Two respondents supported the use of XBRL to facilitate the analysis of financial information while a larger number of replies expressed opposition to its mandatory use and thought that more experience with this system is needed.

Question 10 – Do you have any other views on regular transparency requirements which could make regulated markets more attractive to small listed companies?

A respondent suggested that the language regime should be more flexible. Article 20 of the Transparency Directive should be adjusted so as to allow small listed companies to disclose regulated information only in English. This would reduce translation cost. Also, the current lack of information in English could be an obstacle for investment decisions. This would also help the development of an EU network of national storage mechanisms.

Another respondent suggested that there may be opportunities for a private provider or for a trade association to establish a facility funded jointly by small listed companies and users of financial information to showcase issuers by sector or by other metrics.

II. Information about holdings of voting rights (questions 11 to 18)

Question 11 – Disclosure of holdings of cash-settled derivatives. Would the disclosure of holdings of cash-settled derivatives be beneficial to the market? Please provide evidence supporting your answer (e.g. situations in which lack of disclosure of cash-settled derivatives produced negative results). Please report about your experience, if any, with the disclosure of cash-settled derivatives in the United Kingdom¹² and/or in other jurisdictions where cash-settled derivatives are disclosed (such as in Switzerland).

The vast majority of respondents to this question considered that the disclosure of holdings of cash-settled derivatives would be beneficial to the market with a view to avoid hidden ownership. While cash-settled derivatives are used in the vast majority of cases for their normal purpose which is to gain economic exposure to the issuer and not to gain access to voting rights, the current lack of disclosure in relation to cash-settled derivatives is causing market difficulties: the Takeover Bids Directive¹³ does not apply or applies too late to these instruments, so that a fair market price of the underlying shares is not guaranteed. Some respondents expressed support for a disclosure regime not simply because it would reveal economic exposure to shares – though this was fundamental- but also because it would make the market more transparent generally. However, most respondents considered that the given the high volume of derivatives trading in today's market, there was a need for a threshold at which the ownership of economic interest would become relevant not only for the impact on voting rights (and therefore on control) but also for the price formation in a particular security.

Respondents generally favoured a well targeted and proportionate disclosure system, avoiding the provision of useless or irrelevant information and reducing the number of notifications. There were calls to clarify what should be disclosed (e.g. credit default swaps, or cash-settled OTC products) and also to allow for exceptions (e.g. pure economic exposure; derivatives giving exposure to an index, banks/brokers serving client

¹² A disclosure regime on holdings of cash-settled derivatives was introduced in 2009 in the UK.

¹³ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, *OJ L 142, 30.4.2004, p. 12–23*

transactions, market makers, trading books, etc). There was debate as to whether the thresholds should be calculated on a delta-adjusted basis¹⁴ or on a nominal basis and whether the netting of short and long positions in these instruments should be allowed. Some of the respondents supported a harmonized disclosure system across the EU. Generally, many replies suggested learning from the UK experience.

A small group of respondents, however, was not in favour of a disclosure regime for this type of instrument. Another small group of respondents did not take a firm position. These two groups expressed concerns about possible administrative burden of a regulatory response to a problem which was perceived as limited: the vast majority of cash-settled derivative instruments are bought for trading or hedging purposes and only in exceptional cases these instruments have been used to secretly build a stake in a company. In their view, these cases were driven by a very small number of take-over situations. One respondent in particular considered that a generalised disclosure regime for cash-settled derivatives would be ineffective and misleading. It was not possible, in fact, to distinguish among transactions entered into in order to acquire and/or hide positions in the underlying assets from those transactions which were entered into for purely speculative or hedging purposes. The introduction of a disclosure regime for such kinds of derivatives could jeopardize the efficiency of the entire transparency system and reduce volumes and liquidity of cash-settled derivatives. In addition, such a disclosure regime would cause a significant increase of the organisational and compliance costs for intermediaries.

Some of the respondents suggested addressing the issue of cash-settled derivatives through an anti-fraud provision (e.g. cash-settled derivatives should not be used to avoid applicable notification requirements), through the "acting on behalf" and "acting in concert" rules of the Transparency Directive or through other pieces of legislation, such as the Acquisitions Directive¹⁵, the Takeover Bids Directive¹⁶ or the Market Abuse Directive¹⁷. Some of these respondents, however, were not opposed to disclosure of cash-settled derivatives provided it had a limited impact on investors with pure economic exposure and/or was fully harmonised to avoid complexity and regulatory arbitrage.

In answering this question, some respondents highlighted the positive experience with the UK disclosure system of cash-settled derivatives. For them, disclosures had enhanced transparency of ownership and enabled investors and issuers to determine the voting structure of an issuer's capital and potentially important capital movements. In particular, the UK had not witnessed a dramatic increase in announcements and the market had

¹⁴ If, for example, a call-option is significantly out-of-the-money, to add the nominal value of the shares that can be acquired under the option to the calculation of a disclosure threshold would apparently be futile for some respondents.

¹⁵ Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector, *OJ L 247, 21.9.2007, p. 1–16*

¹⁶ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, *OJ L 142, 30.4.2004, p. 12–23*

¹⁷ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ L 96, 12.4.2003, p. 16–25*

adapted efficiently to the additional obligations placed on them. One respondent, however, considered that the UK disclosure system was costly with few identifiable beneficial results.

Concerning the experience in Switzerland, it was felt that the resulting disclosures were materially less meaningful than in the UK because they were not on a delta-adjusted basis. Also, the reporting of cash-settled derivatives in Switzerland was very broad as it included in the “acquisition basket” the writing of put options.

Question 12.1 – If the Transparency Directive was to require holders of cash-settled derivatives to disclose their positions, should holdings of cash-settled derivatives be aggregated to holdings of voting rights¹⁸ and/or of financial instruments giving unconditional access to voting rights¹⁹ for the purposes of calculating whether the threshold triggering the disclosure obligation is reached or crossed?

The very large majority of the respondents to this question supported the aggregation of cash-settled derivatives with holdings of voting rights²⁰ and of financial instruments already subject to the disclosure under Article 13. Many respondents expressed support for a system similar to that in the UK. Others would prefer different thresholds to apply to cash-settled derivatives. Although there was support for the aggregation of all financial instruments to trigger the notification requirement, in general respondents would prefer that the notification itself presented a breakdown of voting rights and financial instruments according to their nature.

Some respondents specifically supported the disclosure regime extensively described in CESR's reply or similar systems. CESR's proposal was to create a notification system with four different baskets (holdings of voting rights; holdings of financial instruments under Article 13; holdings of cash settled derivatives and total holdings) that would trigger an obligation to disclose the holdings of the four baskets when the threshold for any of the four baskets was reached or crossed.

A minority of respondents did not support such an aggregation, which in their view would confuse the market. They preferred a specific and harmonised notification system for cash-settled derivatives such as the one proposed by the ESME advice.

Question 12.2 – If the Transparency Directive was to require holders of cash-settled derivatives to disclose their positions, and if such disclosure of cash-settled derivatives should be done independently of voting rights and of other financial instruments, which threshold should be applied? E.g. (i) the thresholds provided in Article 9(1) TD should be applied (5%, 10% etc); (ii) the lower/initial threshold for this kind of disclosure should be significant and higher than the 5% foreseen in Article 9(1) TD (e.g. at least 10% or higher); (iii) other).

If cash-settled derivatives were to be subject to a separate disclosure regime independent from the notification of holdings of voting rights and financial instruments under Article

¹⁸ See Articles 9 and 10 TD.

¹⁹ See Article 13 TD.

²⁰ See Articles 9 and 10 TD.

13, some replies suggested setting a sufficiently high notification threshold (e.g. 10%) to guaranteed meaningful disclosure and eliminate irrelevant information. This would also take account of the fact that cash-settled derivatives only indirectly influenced the company.

However, some respondents supported the 5% threshold or other lower national thresholds (e.g. 3%) as initial thresholds for disclosure. For these respondents, even 3% could represent a significant investment in a listed company and therefore a significant influence within a general meeting. As attendance rates at general meetings often did not exceed 50% of the total holdings, the potential influence in general meetings might even be higher than the initial holding. However, it was unclear if these respondents were referring to an aggregated disclosure or to a separate notification system for cash-settled derivatives, which was the purpose of this question.

Question 13 – Transparency of holdings of voting rights after the record date in advance of the general meeting of shareholders (the question of empty voting). Would the establishment of a specific disclosure mechanism for holders of voting rights who do not hold shares between the record date and the shareholders meeting be useful/effective to prevent empty voting practices?

A majority of the respondents to this question believed that a specific disclosure mechanism for holders of voting rights who do not hold shares after the record date for the shareholders general meeting would be neither useful nor effective to prevent empty voting practices. Such a disclosure requirement was seen as onerous, easy to circumvent and difficult to enforce as well as providing an implicit endorsement of empty voting practices. Also, it could result in a *de facto* share blocking, which would be counterproductive.

Many respondents explained that the perceived problem (separation of voting rights and economic exposure) was the norm and wanted consequence of the record date and abandonment of the share blocking system in EU law. In their view, it would be preferable to have shorter intervals (two/three days) between the record date and the general meeting, as is the practice in UK and FR, to deal with the problem. Concerning securities lending, several respondents explained that market practice (e.g. Securities Lending Association guidance) did not support borrowing of shares in order to vote and that in any event lenders could always recall shares. However, it was also argued that requiring lenders systematically to recall shares before the record date would not be useful, as this would result in volatility. One respondent explained that the recent Commission proposal on disclosure of short selling positions would also be helpful.

Around a quarter of respondents supported a specific disclosure mechanism for holders of voting rights who do not hold shares after the record date for the shareholders meeting. There was some support among these respondents for the proposal of the European Corporate Governance Forum on February 2010²¹ and for an upcoming disclosure obligation in France which would require disclosure to the issuer and to the supervisor of stock lending agreements concerning at least 1% of the voting rights between the record date and the general meeting.

²¹ EUCGF Statement - 20 February 2010:
http://ec.europa.eu/internal_market/company/docs/ecgforum/ecgf_empty_voting_en.pdf

Other respondents did not take a firm position. Some considered that more work was needed to properly assess this issue and the need for specific measures. Others believed that this issue should not be dealt with in the Transparency Directive. Reference was also made to the need to maintain contractual freedom.

Many respondents, whether in favour or against the specific disclosure obligation linked to the record date, argued the need to improve transparency around stock lending practices in general. Views on stock lending practices are further detailed in Annex 2.

There was no support for a ban on empty voting.

Question 14.1 – If a specific disclosure obligation is imposed regarding the transfer of voting rights independently of the shares between the record date and the general meeting, which threshold of voting rights should be applied in order to trigger the obligation? E.g. 0,5%, 1%, 2%, other.

A relatively small number of replies were received to this question. If such an obligation were to be imposed, the majority of respondents would support the use of the same thresholds as for the normal notification obligations: i.e. starting at 5% or the lower national threshold, where it exists.

Many respondents called for further empirical study of empty voting practices.

Question 14.2 – If a specific disclosure obligation is imposed regarding the transfer of voting rights independently of the shares between the record date and the general meeting, which time-limit for the disclosure should be applied for this disclosure to be useful? E.g. immediate disclosure; no later than 1 day, other.

A relatively small number of replies were received to this question. If such an obligation were to be imposed, respondents were divided as to the time-limit for the notification: some were in favour of immediate disclosure, others were in favour of a disclosure no later than 1 day, and some respondents suggested keeping the existing time-limits in the Transparency Directive.

One respondent suggested that this information should be disclosed on the date of the general meeting or immediately before.

Question 15 – Intentions with holdings or voting policies disclosure. Which is the best way to make the investment process more transparent? i) requesting investors to disclose their future intentions with holdings; ii) requesting investors to disclose their actual voting policies; iii) both; iv) none; v) other.

Views were relatively split on this question. A slight majority of respondents were not convinced that requiring investors to disclose their future intentions or to disclose their actual voting policies should be the way forward. They argued that such requirements would lead to: (i) the unnecessary dissemination of information in the market; (ii) add little value to market participants; and (iii) increase compliance costs.

Concerning the disclosure of intentions, arguments were further detailed under question 16. Concerning the disclosure of voting policies, in practice respondents felt that it would not result in improved transparency, was not a matter of public interest and should therefore be left to institutional investors and their clients to agree upon. It was also argued that the role of institutional investors was evolving in a very satisfactory manner

through self-regulation and that it was unnecessary to address the issue at EU level. For other respondents, this was a corporate governance issue that should not be addressed in the Transparency Directive.

Some respondents suggested establishing a system for the identification of shareholders: if issuers knew their shareholders they could enter into dialogue and engagement with them more easily. Others supported the UK Stewardship code for institutional investors which encourage institutional shareholders to proactively engage with companies.

Other respondents supported the need for regulatory intervention. However, they did not agree on the solution. Among these respondents, a slight majority was in favour of requesting investors to disclose their actual voting policies rather than requesting investors to disclose their future intentions with holdings. Only few respondents were in favour of combining both options.

Those in favour of disclosing voting policies considered that such disclosure (as well as the disclosure of engagement policies and actual voting records) would render fund managers accountable for their approach to corporate ownership. It was also explained that transaction costs for issuers would be reduced with regard to the preparation of the general meeting but also with regard to the ongoing investor dialogue. Some respondents explained that Article 21 of Directive 2010/43 (UCITS IV) required UCITS management companies to determine a strategy on when and how voting rights attached to instruments held in managed portfolios are exercised. A summary description of the strategy must be made available to investors and details of actions taken must be made available to unit holders upon request. One respondent replied that investment managers often disclose their voting policies: this was a matter of corporate governance and fiduciary duties, and less related to creating transparency around voting rights. This respondent requested that violation of any disclosure obligations should not impact the exercise of voting rights as this would create material legal uncertainty for issuers. Other respondents also echoed the view that disclosure of voting policies was more a matter of corporate governance. Some also supported the establishment of a system for the identification of shareholders.

<p>Question 16.1 – If investors were required to disclose to the market which their intentions are <u>with</u> regard to their investment, would such disclosure be useful?</p>
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A large majority of respondents to this question were not convinced by the merits of such a disclosure. Different reasons were advanced: (i) such disclosure would provide little added value as statements of intention were not helpful and could be misleading; (ii) experience in the US, France and Germany shows that such disclosures are meaningless; (iii) too much transparency renders the market too volatile or indeterminable; (iv) it would be difficult to enforce as intentions change rapidly; (v) it raises concerns from the market abuse perspective because intentions change; (vi) it may be dissuasive for shareholders wishing to engage in future takeover activity and could facilitate anti-takeover defences; (vii) it may trigger the application of takeover legislation in certain cases; (viii) it would render the EU market unattractive; (ix) intentions are a private matter for the investors and such disclosure could harm them; and (x) administrative burden and compliance costs would be high.

A minority of respondents, on the contrary, were favourable to the introduction of a disclosure obligation on intentions since they saw it as beneficial at least in relation to significant holdings: it would allow other investors (and issuers) to better understand the background of a major shift in influence and to adjust their investment decisions, voting

behaviour and investor relations strategy accordingly and to decide whether to engage with investors. One respondent suggested that it would be worth considering whether to apply the respective disclosure requirements also to large positions in other financial instruments (including certain qualifying derivatives). Some respondents indicated that the right balance between privacy/confidentiality and the market efficiency needed to be found: it should not be too burdensome for investors while at the same time providing reliable insights on the intentions of major shareholders. In addition, a coordinated regime with the takeover rules would need to be established. References were made to the positive experience with the French system but calls were also made for a harmonised EU regime as the diversity of systems currently in place was difficult and costly to manage and lacked clarity for all parties concerned.

Several respondents considered that the real problem was the lack of shareholder identification (see question 18).

Question 16.2 – If investors were required to disclose to the market which their intentions are with regard to their investment, which should be the minimum threshold triggering such disclosure? *i) the thresholds provided in Article 9(1) TD should be applied (5%, 10% etc); ii) the lower/initial threshold should be significant and higher than the 5% foreseen in Article 9(1) TD (e.g. at least 10% or higher); iii) the information should only be requested only if certain threshold are crossed and provided that the investor is among the largest 3 investors in the issuer; iv) other.*

The majority of the respondents to this question supported option ii) for an initial threshold higher than 5% for disclosure of intentions. Most proposed 10% as an initial threshold, with few respondents opting for at least 20%. One respondent proposed a mixed system with 10% for active investors seeking control and 20% for passive investors.

Some respondents proposed applying the thresholds provided for in Article 9(1) of the Transparency Directive or the national thresholds (the initial threshold being set at 3% in some Member States). One respondent suggested an initial threshold of 3%.

One respondent opted for option iii) combined with a threshold of 20%. Two respondents proposed alternative solutions: e.g. the threshold should mirror a blocking minority stake at the annual general meeting; the threshold should follow the US system.

Two respondents indicated that the takeover bids regime should not be undermined and that any obligation should only be set at 30%, which in any case triggered the mandatory bid.

Question 16.3 – If investors were required to disclose to the market which their intentions are with regard to their investment, should such disclosure consist in *i) simple information on intentions (e.g. box ticking in a form: I intend to change/influence control of the issuer/I do not intend to change/influence control of the issuer); ii) more substantial information on intentions (e.g. narrative explanations on purpose of the acquisition including any plans or proposals of the investor for future purchases or sales of issuer's stock or for any changes in the issuer's management or board of directors etc.); iii) information on source and amount of funds used to acquire the securities; iv) arrangements to which the investor is a party relating to issuer's securities; v) other.*

Respondents were relatively divided on this issue.

Some favoured option i) with a simple disclosure obligation. They did not express support for requiring investors to provide a detailed narrative of investment intentions. It was argued that a more extensive obligation to disclose intentions would represent an intrusion to the freedom and ownership rights of investors and would raise the question of how the accuracy of the disclosure can be reviewed and which penalties would be linked to any false disclosure. Some respondents supported the US system (declaring whether the investor is a passive investor or not).

A similar number of respondents supported a narrative disclosure with more substantial information on intentions rather than a box-ticking form. Some combined option ii) with options iii) and option iv).

One respondent was not in favour of box ticking only, supported option iii) but was careful as regards option ii); the disclosure requirement should not go too far in the direction of the information provided in connection with a takeover bid. Another respondent explained that not all classes of investors should be required to disclose the same amount, or type, of information.

Two respondents did not choose any of the options, but expressed diverging positions: one in favour of disclosure of intentions, one against. Some respondents expressed support for the French regime.

Question 17 – Aggregation of holdings and voting rights. Should holdings of shares and voting rights²² be aggregated with holdings of financial instruments giving unconditional access to voting rights²³ for the purposes of calculating the relevant thresholds that trigger the notification obligation?

Almost all respondents to this question were in favour of aggregating holdings of shares and voting rights with holdings of financial instruments described in Article 13 of the Directive for the purposes of triggering the notification obligation. It was argued however that there was a need to coordinate with takeover bids rules and that a transitional period would be needed. Several respondents considered necessary that the notification identify the different categories of holdings. Several replies also supported a notification system similar to the one described in CESR reply (see also replies to question 12.1).

Two respondents expressed no preference but requested an EU harmonised system. The need for harmonisation was also expressed by several respondents. For further details, see also question 19.

Question 18 – Other cases of insufficient transparency regarding corporate ownership. Are there other cases of potentially insufficient transparency regarding corporate ownership?

Several respondents supported a system for identification of shareholders by issuers through the central securities depositories (CSDs), similar to those in place in France or in the UK. They believed however that shareholder identification data via CSDs on a

²² Articles 9 and 10 TD.

²³ Article 13 TD.

cross-border basis faced many obstacles and that there was no information available on beneficial owner behind the nominees. Some respondents made reference to the current work within Target 2 Securities, which was considered to be an appropriate vehicle for identification of shareholders. In their view, without a harmonized EU-wide set of rules with respect to the disclosure by nominees of their participants (and ultimately the beneficial owner) there would be no common technical solution across the EU. Some of the respondents challenged the assessment made in Annex 11 of the Commission staff working document that accompanied the Commission report.

However, there was a dissenting view which specifically requested not to enact a system for the identification of shareholders.

Respondents also identified other issues that would need to be addressed: gaps regarding disclosure of stock lending and repurchase contracts as well as the rules on acting in concert. One reply suggested that the Transparency Directive needed to be adapted to capture and anticipate future innovation in financial markets so that transparency was maintained.

CESR suggested the need to revisit Article 12(1) of the Directive since Member States were already requiring more information than was listed in that Article. One respondent explained that XBRL taxonomy could easily be developed to cover major holdings disclosures.

Only few respondents considered that there were no cases of potentially insufficient transparency regarding corporate ownership.

III. Ineffective application of the Directive because of diverging national measures and/or unclear obligations in the Directive (questions 19 to 23)

Question 19 – Uniform EU Regime or maximum harmonisation: major holdings of voting rights. Would it be desirable to set up a uniform EU regime (e.g. by a directly applicable EU Regulation) for the notification of major holdings of voting rights?

A small majority of respondents to this question supported an EU Regulation for the notification of major holdings of voting rights. In their view, a uniform regime would: avoid national differences; reduce administrative expenses linked to IT infrastructure and monitoring systems for equity positions of issuers based in different Member States; reduce uncertainty; enhance transparency; simplify cross-border investments; and increase attractiveness of EU capital markets. Such a regulation would be an important step towards the EU single rule book.

Two respondents supported a uniform “process” for the submission of major holdings notifications: it should be electronic, use a standard form and be submitted to one central EU authority, from which issuers/markets would then receive the information for the purposes of dissemination.

For some respondents, the uniform notification regime should encompass: scope, exemptions, definitions, calculation methods (including aggregation), disclosure content, implementation methods, time-limits and sanctions.

The question of the thresholds was however secondary for more than one respondent. Some replies suggested leaving a degree of flexibility to the Member State in setting

thresholds in order to take account of the specificities of national regulated markets, national company laws or companies' articles of association.

Some however, expressed concerns about a possible levelling down of notification requirements to the lowest common denominator in a Regulation. One respondent advocated working towards a common regime that would reflect the best aspects of the most developed ones. Others directly supported the UK system.

A number of respondents were not in favour of a Regulation for notification of major holdings, although almost of all them recognised the need for further harmonisation in the Transparency Directive. As explained in replies to questions 12 and 17, there was some support for a harmonised regime based on CESR's proposal. However, several respondents believed that full harmonisation was not feasible nor appropriate. In their view, thresholds could not be harmonised, because of the different national company law regimes. Minimum harmonisation allows national regulators to tailor disclosure requirements to national circumstances and individual countries should not be prevented from establishing an environment for transparency that goes beyond the regime of other Member States. Also, Member States should be free to react to market innovations in due time, to improve and adjust models to their own market, as there are big differences within the EU as regards the size of capital markets, market capitalisation of listed companies and level of fragmentation of ownership.

A contribution from an academic respondent developed the question of maximum vs. minimum harmonisation. This respondent was not in favour of a uniform regime. First, imposing a uniform rule assumed that there was a single disclosure threshold which would be efficient for all securities markets across the EU. This may be so, but it was not obvious. Second, assuming there was a single efficient disclosure rule across the EU, the EU legislative process had to be able to identify it. Again, this was not obvious. Finally, a uniform rule removed from Member States the freedom to innovate, experiment and react quickly to evolving circumstances. For understandable and unavoidable reasons the EU legislative process is slower than national legislative mechanisms. Thus, there was a risk that, even if the EU could identify a uniform efficient rule, it would not be able to keep that rule up to date as circumstances changed. Consequently, the efficiency of EU legislation in this area would depend on the retention by Member States of the freedom to set more stringent rules where this was appropriate.

Another respondent believed that new legislation would create new areas of uncertainty or would be unable to deal with the new situations that might arise in EU capital markets. This respondent suggested that identifying the issues and providing guidance (e.g. through CESR) would be preferable.

Finally, some respondents generally supported more harmonisation but were not fully clear as to whether they are in favour of a uniform regime or not.

Question 20 – If a fully uniform EU regime is not possible because of insurmountable legal barriers, should Member States be prevented from adopting more stringent requirements than those of the Transparency Directive regarding the notification of major holdings of voting rights²⁴?

²⁴ For instance, if the Transparency Directive was to reduce its initial disclosure threshold from 5% to 3%, should the Member States that have set a 2% threshold be required to raise it to 3%?

A small majority of respondents to this question considered that, if a fully uniform EU regime were not enacted, Member States should not be prevented from adopting more stringent requirements than those of the Transparency Directive regarding the notification of major holdings of voting rights. Several respondents would like to maintain the transparency levels - in particular lower thresholds or stricter time-limits for disclosure,- in their countries²⁵ and feared a possible reduction of transparency that a harmonised regime may entail.

Several UK and Irish respondents were in favour of maintaining the UK regime regarding identification of shareholders and Irish and UK regimes on takeovers. Concerning takeovers, some respondents explained that if the Transparency Directive were to become a maximum harmonisation directive, it should recognise the distinction between that regime and the takeover bids regime and that it should specifically state that the maximum harmonisation measures were without prejudice to the Takeover Bids Directive and to the power of supervisory authorities in Member States to regulate takeovers under national law. Otherwise, there would be a risk of legal uncertainty. In addition, the Takeover Bids Directive was a minimum harmonisation directive recognising the need for flexibility in supervising takeovers.

An important minority, however, supported maximum harmonisation within the Transparency Directive, thus preventing Member States from imposing more stringent requirements. One respondent claimed that issuers should be prevented from requiring more onerous disclosures via their constitutional documents. Another respondent requested that a database be created containing additional requirements that issuers add in their articles of associations: currently, this information was difficult to find out. Another respondent also requested that stock exchanges be prevented from adopting more stringent requirements.

Some made clear, however, that in their view any maximum harmonisation in the Transparency Directive should not affect the takeover bids regime.

Question 21 – Uniform EU Regime or maximum harmonisation: disclosure by issuers. Would it be desirable to set up a uniform EU regime (e.g. by a directly applicable EU Regulation) regarding issuers' disclosures²⁶?

The opinions on this question were split. A large number of respondents were not in favour of setting up a uniform regime regarding issuers' disclosures. They did not see any problem with current requirements nor a need for further harmonisation. Moreover, they felt that Member States should be allowed to set more stringent requirements when they had identified gaps in companies' disclosures or in their level of transparency.

A significant number of respondents were, however, in favour of a uniform regime on this issue. In their view, a uniform regime, with normalization/standardisation of types of regulated information, would reduce costs for issuers, ensure that investors had a clear understanding of the information that issuers were expected to provide and facilitate a level playing field across EU financial markets. For one respondent, the harmonization of the information available to investors in the market was a key point in the investment

²⁵ In particular in the UK, but also in Norway, France or Germany.

²⁶ Articles 4 to 8 TD.

process: in order to avoid any potential misunderstanding stemming from different formats or channels used by issuers to disclose relevant information, it would be useful to fix, at European level, a disclosure process directly applicable in all Member States without any options/discretions in its implementation.

Another group of respondents favoured a uniform regime regarding country-by-country disclosure of annual accounts and/or specific disclosure requirements for companies active in the extractive industry regarding the publication of payments to governments.

Question 22 – Divergent rules: calculation of holdings. Could you please explain in what way national rules implementing the Directive result in different methods for aggregating holdings of voting rights (and where applicable financial instruments) for the purposes of calculating whether the relevant thresholds triggering the notification obligation are reached or crossed by investors?

Respondents mentioned different examples of divergent rules for calculation of holdings and underlined that these divergences implied difficulties and costs for companies with cross-border activities.

The issues mentioned concerned for example stock lending, aggregation requirements, exemptions and differences in the legal entity level to which disclosure duties applied. More detailed presentation of the issues is included in Annex 2.

Question 23 – Unclear rules. Could you provide evidence of cases where unclear rules in the Directive ought to be clarified²⁷?

Respondents called for clarifications regarding most of the issues identified in the previous question. In addition, respondents identified other potential areas where clarification of the Transparency Directive would be helpful, for example concerning the definition of "acting in concert". Moreover, respondents underlined the need to ensure consistency between the Transparency Directive and other EU directives such as the Shareholders Rights Directive²⁸, the Market Abuse Directive or the Prospectus Directive. Most areas where clarification was welcomed by the respondents are described in detail in Annex 2.

IV. Other comments (question 24)

Question 24 – Do you have any other comments regarding the Transparency Directive?

Financial reporting and Corporate Governance

A group of respondents requested that the Transparency Directive require the disclosure of annual accounts on a country-by-country basis and/or of payments made to governments by companies active in the extractive industry. They explained that recital 14 of the Directive had not been implemented. These respondents identified the data to be disclosed and how this should be done (audited, comparable, interactive data). They

²⁷ See section 2.8 and Annex 6 to the Staff Working Document.

²⁸ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, *OJ L 184, 14.7.2007, p. 17–24*

referred to recent US and Hong Kong legislation, to IASB work and to European Parliament calls. Some described the possible benefits to investors from these disclosures.

One respondent suggested a comprehensive business reporting framework that would enable corporate management to express their company's own way of using intellectual assets and other non-financial elements for the purpose of creating value, and by pointing out also how the past and future financial performances connected to non-financial elements. Economic and social governance (ESG) was just a part of critical company non-financial information. The latter would also cover information on technological competences, organizational capabilities, human assets, business networks, risks etc. Non-financial information should focus on "sustainability" and "value creation capacity".

Some respondents mentioned the need to establish a shareholder identification system (see also replies to questions 15 and 18), although not necessarily in the Transparency Directive.

Other respondents mentioned that corporate governance disclosures should not be incorporated in the Transparency Directive or harmonized. This was a matter for company law. The same was true regarding the transparency provisions in the Takeover Bids Directive.

Some respondents also mentioned that the Transparency Directive should not be the vehicle for ESG disclosure and that non-financial disclosures should not be harmonized.

Dissemination and storage of regulated information

Some respondents explained that they were not in favour of an EU OAM. It would be preferable to inter-connect national storage systems. Recital 8 of the Directive should be preserved in order to maintain an appropriate level of transparency in listed companies but also to ensure that all investors, whether individual or professional have an equal access to information without discrimination.

Some respondents supported the use of XBRL for disclosures, in order to increase visibility and comparability and thereby encourage cross-border investment but also as a tool to deal with the language problem. Other respondents however opposed this proposal.

One respondent claimed that there were problems in the way the dissemination rules were applied in some countries. For instance, regarding Article 12(7) in Sweden, the regulator had appointed a service provider which owned the information. For this respondent, this would not be in conformity with Article 21. This respondent also complained about the entrustment of stock exchanges with the OAM function (Finland, Norway), which allowed them to present themselves as "entrusted by the government" to handle regulated information in competition with service providers. In other cases, regulators (Spain, Portugal) disseminated the information themselves, but did not offer any integration path for service providers. This had the negative effect of blocking competitors from entering the local market for distribution of regulatory information and would be in contradiction with recital 25 of the Transparency Directive and recital 16 of

the implementing Directive²⁹. This respondent requested that action should be taken to restore competition and avoid that OAMs abused their position.

One respondent explained that issuers either wished either to disseminate regulated information themselves (e.g. through their own websites) or to continue to use the services of data disseminators, if the provisions of the Transparency Directive remained unchanged. Issuers did not necessarily believe that regulators should play an active role in disseminating regulated information disclosed by issuers.

CESR also raised a number of issues that need to be addressed (see Annex 2)

²⁹ Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

ANNEX 1 – LIST OF RESPONDENTS

Action Solidarité Tiers Monde
ABI
ACCA
AFEP
AFG
AFME
AMAFI
AMF
Association of Foreign Banks in Germany
Association of Investment Companies
Assosim
BBA
BDI
BNP Paribas
Bond
Business Wire Brussels
BVI
Central Chamber of Commerce of Finland
CESR
Christian Aid
CMVM
Concord Europe
Confederation of Finnish Industries EK
Confederation of Netherlands Industry and Employes (VNO-NCW)
Credit Agricole
Czech Republic Ministry of Finance
Danish Institute of State Authorized Public Accountants (FSR)
Danish Insurance Association (DIA)
Danish Shareholders Association (Dansk Aktionærforening)
Danish Shipowners Association
Dansk AMP
Denmark Ministry of Economic and Business Affairs
Deutsche Aktieninstitut (DAI)
Deutsche Bank
Deutsche Börse Group
Dutch Ministry of Finance
EAPB
EBF
ECODA
EFAMA
Emisores Españoles
ENPA
Equinity
ESBG
Eumedion
Euroclear
Eurodad
EuropeanIssuers
Eurosif
FAR (Swedish Institute for the Accountancy Profession)
FEE

Financial and Capital Market Commission of Latvia
Finland Ministry of Finance
France Treasury
GC100 Group
German Insurance Association (GDV)
German Investor Relations Association (DIRK)
Germany Ministry of Finance
GlaxoSmithKline
Global Witness
Governance for Owners
Grant Thornton
Hermes Equity Ownership Services
Hungary Ministry for National Economy
ICAEW
ICGN
ICJCE (Instituto de Censores Jurados de Cuentas de España)
ICMA
ICSA
IMA
Inspiration
Institute of Directors
International Securities Lending Association
Investors Relations Society
Irish Stock Exchange
Irish Takeover Panel
Law Society of England and Wales
London Stock Exchange Group
Matheson Ormsby Prentice
Maurice Macartney (Beyond Skin Global)
MEDEF
Middlenext
Nasdaq OMX
NBIM (Norges Bank Investment Management)
Nordic Securities Association
Norway Ministry of Finance
NYSE Euronext
OEKB
Olvi Oyi
ONE
Oxfam International
Professor P. Davies
Publish what you pay
PWC
QCA
Revenue Watch
SIFA (Swedish Investment Fund Association)
Smith & Nephew
Société Générale
Sweden Financial Supervisory Authority
Swedish Bankers' Association
Tax Research / Tax Justice Network
The Hundred Group of Finance Directors
Thomson Reuters
UK HM Treasury & FSA

UK Takeover Panel

WICI

WKO - Austrian Chamber of Auditors

XBRL Europe

ZKA

An additional respondent requested confidential treatment.

ANNEX 2 – DETAILED DESCRIPTION OF ISSUES THAT NEED CLARIFICATION/AMENDMENT ACCORDING TO REPLIES TO QUESTIONS 22, 23 AND 24.

Divergent rules in the Member States concerning calculation of holdings (Question 22)

- Different thresholds trigger disclosure in the Member States: for example thresholds are fixed at 2%, 3% and 5% in different Member States.
- Differences in disclosure reporting deadlines.
- Differences in determining the denominator (total shares/voting rights): the denominator varies in the different national implementations. For example, the denominator consists of the total number voting rights in Germany; total share capital and total number of voting rights in France; total number of voting rights (including treasury shares) and voting rights per class in Greece; total number of voting rights (excluding treasury shares) and voting rights per class in the UK. In Finland, both the percentage of shareholdings as well as voting rights is required to be notified under article 9.
- Differences in determining the notified holdings (numerator) (see also the replies to Q23 below):
 - Financial instruments are considered differently in Member States. Some Member States require aggregation of shares with physically settled derivative instruments; others do not; some require reporting of these products by bucket; others do not. For derivatives, whether they are physically or cash-settled, there are two methods to take them into account: on a nominal or delta-adjusted basis;
 - Differences in the legal entity level to which disclosure duty applies: depending on the Member State, thresholds might need to be monitored and disclosed at group and/or entity level;
 - Differences in intra-group aggregation;
 - Different treatment of stock lending in Member States as explained in Annex 10 to the Commission Staff Working Document;
 - Question the netting between long and short positions;
 - Implementations differ in Member States concerning the treatment of holdings of asset managers;
 - Different definition of market making and of the method of claiming the exemption. There is inconsistent interpretation of definitions across Member States.
- The events triggering a crossing of thresholds may differ from Member State to Member State – for example due to property law differences.

Rules under the Transparency Directive identified by the respondents that require further clarification (Question 23):

- Home Member State rule
 - There is a possible contradiction between the Home Member State rule and the wording of Article 8(2) of Directive 2001/34/EC as it provides for additional obligations and disclosures potentially required by Host Member State. Moreover, CESR notes inconsistencies between Articles 19(1) and 21(3): Article 19(1) requires issuers to file information with the competent authority of the home Member State. Article 21(3) on the other hand requires issuers to disclose information in accordance with host Member State rules if the issuer's securities are admitted to trading only in one host Member State and not in the home Member State.
 - Transparency Directive is unclear with regard to which country is the home Member State for issuers who have to choose their home Member State according to article 2, paragraph 1, sub (i), (ii), but who have not done so. In this respect, CESR suggests to amend the Transparency Directive to include an assumption of Home Member State for these issuers.
 - In addition, some flexibility could be added to the home Member State rule for third country issuers of shares and debt securities with denomination per unit of less than EUR 1.000 for situations where an issuer delists from a regulated market in one Member State and later applies for admission to trading on a regulated market in another Member State.
 - CESR also suggests that the home Member State rule should be clarified as follows: it should be stated that the three year period for the validity of issuer's choice of the home Member State no longer applies if shares or debt securities with denomination of less than EUR 1.000 of the same issuer are admitted to trading on a regulated market.
 - There should be a list established by CESR and available online of non-EEA issuers who have chosen a home Member State.
 - Further clarification would be helpful regarding issuers who are incorporated in one EEA state and have securities admitted to trading only in another EEA state. Currently they would be required to comply with the requirements of their country of incorporation and announce regulated information in that country rather than in the country where, arguably, their investors are likely to reside.
 - A revision of the Transparency Directive should ensure that the reporting of all listed companies are subject to enforcement in a Member State. It is important that the Transparency Directive in this matter in the future does not provide for any possibility to implement the rules in such a way that a listed company can operate without being under supervision of any Member State.
- Accounting rules
 - Applicability of Article 4(3) to third country issuers: Article 4(3) states that where issuers are not required to prepare consolidated accounts, the audited financial statements shall comprise the accounts prepared in accordance with the

national law of the Member State in which the company is incorporated. Clarification is required for cases where the issuer is incorporated in a third country but is listed on a regulated market in the EU.

- New loans
 - The application of article 16, paragraph 3 of the Transparency Directive leads to the question of which additional information is required by the issuer of securities admitted to trading on a regulated market when issuing a new loan. In this respect, CESR proposes to abolish the requirement to disclose all new loan issues. This requirement overlaps partially with the Prospectus Directive and Article 6 of the Market Abuse Directive. Reference to new loans is also unclear, as new loans are not defined in the Transparency Directive. For example, it is unclear whether issues of commercial papers or loans not admitted to trading on a regulated market should be disclosed. Some respondents considered that Article 16.3 should be deleted: the implementation of article 16.3 is unclear and complex notably due to the absence of any materiality clause.

- Need for standard forms to disclose holdings
 - Harmonized disclosure forms and wording would be useful in order to avoid, for example, diverging approaches with respect to the disclosure of percentage of voting rights and/or share capital.
 - Some respondents would favour a common electronic form for notifications in the EU.

- Aggregation methods
 - Clarity is needed on aggregation, specifically for asset managers (of the assets held on behalf of their clients by third party custodians, but controlled by the asset manager) and for groups of companies.
 - Rules on aggregation of shares with derivatives should be clarified. The delta adjusted method for aggregation seems to be preferred as it is representative of the number of shares the person writing the instrument would need to hold in order to perfectly hedge its exposure.
 - It would be necessary to have a clarified and harmonized regime on how baskets of shares and indexes are taken into account.
 - Basket and index instruments, if included in the reporting of major holdings, should only have to be reported if the relevant share has at least a weighting of 1/3 in the basket or index (see also legislation in Switzerland and Hong Kong).
 - The treatment of stock loans and repurchase transactions would need to be clarified.
 - Treatment of re-hypothecation of securities by agents, custodians and lenders as well as treatment of hedging by a market-maker need to be addressed.

- Groups of companies
 - The definition of “controlled undertakings” in Article 10 (e) of the Transparency Directive should be clarified. Currently, Member States apply different control thresholds which may lead to different definitions of groups of companies, and thereby to different aggregation perimeters.
 - CESR guidance regarding corporate group disclosures would be desirable as there is divergence across Member States as to whether (i) it is mandatory for a parent company to make an aggregated disclosure of both its own shareholdings and those of its controlled undertakings, and (ii) if the parent does so, that the controlled undertakings are exempt from making their own individual applicable disclosures. The divergence of approaches may be due, in part, to Article 12(3) of the Transparency Directive appearing to state that parent aggregation is permissive as opposed to mandatory.
 - CESR guidance regarding the approach on netting of holdings of voting rights would be desirable, as the Transparency Directive is silent on this issue, e.g. netting intra-group and at the parent level (where the parent is making a group disclosure).
- Acting in concert
 - There should be a common definition of acting in concert i.e.: for investors to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer. One respondent considered that the question of “acting in concert” which also has an impact on the determination of the company’s control and therefore varies across the European jurisdictions, should only be discussed at the European level in the context of a wider European consultation (for instance on the occasion of the review of the implementation of the Takeover Bids Directive). Another respondent considered that it may be useful to clarify the principle of ‘lasting common policy’ referred to in Article 10(a) of the Transparency Directive. However, this respondent was opposed to the creation of any terminology that relates to the definition of ‘acting in concert’ currently contained within the Takeovers Bids Directive, or employs the terminology of ‘acting in concert’. CESR has discussed in this respect whether the concept of shareholders agreeing to adopt a lasting common policy towards the management of an issuer (Article 10(a)) should be clarified in relation to major shareholding notification obligations. The purpose of this would be to provide clarity as to when the voting rights of shareholders would need to be aggregated as an indirect holding. CESR considers that legal certainty for investors could be improved through amending the text at Level 1 and ensuring consistent application of major shareholding notification obligations at Level 3. However, any clarification to the Transparency Directive should not lead to loopholes being created nor interfere with the takeover rules.
 - There is a need to clarify whether in a situation where the voting rights held by a third party with whom a person or legal entity acts in concert are attributed to that person or entity for the purpose of notification requirements according to Art. 10 (a), the person or legal entity has also an individual notification obligation (regarding its “own” voting rights), and whether the notification

obligation is triggered as well by transfers of voting rights within the group of persons acting in concert.

- Stock lending
 - There is a need for a harmonized regime concerning stock lending. Some respondents suggested that the lender should not be required to report, as they have replaced the holding of the share with the holding of a right to recall the share. As they have the right to recall, and will at some stage do so, any disclosure on their behalf to the market would swamp the market and be potentially misleading. Another respondent was in favour of transparency for both the lender and the borrower (subject to an exemption for very short-term transactions) as this would be the clearest way to ensure that no shares are double counted. A simple system could be possible if the same rule were to apply to all stock lending transactions, irrespective of contractual terms. This would eliminate diverging interpretations in different jurisdictions and according to deferring contractual arrangements which is otherwise problematic. CESR also suggested in this respect further harmonisation of major shareholding notifications relating to securities lending (e.g. right to recall lent securities) and repurchase agreements.
- Exceptions to the notification of major holdings
 - A broad and consistent "market maker" definition would be welcome (Article 2).
 - Some clarifications would be welcome concerning the scope of the exceptions for shares acquired for the purpose of clearing and settling and by custodians (Article 9(4)). For example, one CESR member stated that in its Member State it had been discussed whether the exemption also applied to positions acquired for a short period through underwriting.
 - Regarding the exception foreseen by Article 12(4), a clarification would be welcome concerning the scope of this exception and the question as to whether the exception applies to funds that do not fall within the scope of application of the UCITS-Directive (85/611/EC). Some respondents (including CESR) suggested that the UCITS exemption contained in Article 12(4) should extend to non UCITS management firms. Moreover, CESR suggested that it should be made clear that in case the second subparagraph of Article 12(4) is applied, all holdings managed by the management company should be attributed to the holdings of the parent company (and not only the holdings of the fund where the parent company has invested in).
 - Clarification to the trading book exemption would be needed (Article 9(6)): It should be clarified, inter alia, whether the 5 % threshold is calculated at group level or the level of an individual company. Moreover, it should be clarified how the different categories of holdings are aggregated when calculating the threshold. CESR proposed the threshold to be calculated at group level where disaggregation exemptions set out in Articles 12(4) and 12(5) do not apply and that holdings of all instruments (Article 9, 10 and 13) are aggregated. Moreover, further clarification to subparagraph (b) should also be considered. The wording of the subparagraph should be more definite in order to more clearly prohibit credit institutions and investment firms applying the exemption from exercising

voting rights held in their trading book and from using their shareholder positions to intervene in any way in the management of the issuer.

- It should be analysed whether the scope of the trading book (Article 9(6)) exemption could include life insurance companies on an even footing. The analysis should target equivalent regulation of such insurance companies vis-à-vis credit institutions and investment firms.
 - In Article 8 (1) (b) concerning exemptions: an interpretation of the word "exclusively" is needed.
 - Modification of Article 8(1) would be welcome to ensure that issuers guaranteed by a State/province/municipality of OECD countries are exempted from presenting annual accounts. These issuers benefit already from a simplified prospectus regime. Regarding 8(1)(b), the alignment between the Prospectus Directive (as amended) and the Transparency Directive is also required.
- Notification duty
 - A harmonized approach is needed to align duties. For example: disclosure to whom? (which regulator); by which deadline (T+3) and by which methods (including form and language).
 - There is a need to clarify whether a notification duty is triggered by a trade as such (most jurisdictions) or only by the settlement of the trade (Germany). Having different events (i.e. trade or settlement) triggering the notification requires investors to maintain two separate monitoring systems, one supplying trade dates and the other supplying settlement dates.
 - Thresholds triggered by corporate actions: It is often difficult for investors to monitor notification obligations that are triggered by corporate actions (e.g. capital increases). A central database indicating the relevant total number of voting rights and on which the investors can rely when determining their notification obligation would be helpful. Any such database should be in a format that allows the import of data by investors.
 - It would be useful to clarify the question whether the underlying holders need be disclosed by portfolio managers.
 - Clarification of definitions
 - It would be useful to clarify the concept of "make public" in articles 4, 5 and 6.
 - It should be made explicit that the annual reports to be disclosed within the four month deadline cannot be those approved by the general meeting.
 - Applicability of Transparency Directive to depository receipts when the underlying shares are not admitted to trading on a regulated market: the applicability of different rules (especially Articles 9–13 and 16–18) to depository receipts and holders of depository receipts or holders of underlying shares should be clarified.

- It should be clarified that the requirement of Article 12(3) of the implementing Directive (Directive 2007/14/EC) providing for regulated information to be communicated to the media in "unedited full text", permits this information to be produced in PDF.
 - Terms used in Article 9 (2), "as a result of events changing the breakdown of voting rights", should be clarified. For example, it could be clarified, as the FSA has done in the UK (see DTR5.1.2R(2)), that where there is a notifiable switch (e.g. 1% for UK issuers) from a soft shareholding to an absolute shareholding by the exercise of entitlements to acquire shares, without affecting the overall percentage of the holding, a new disclosure would be required. It could also be clarified that this particular provision does not necessitate a disclosure where a person has disclosed its holding of voting rights, but then it subsequently changes the capacity in which it holds them. For example, where a person has disclosed its indirect holding of shares as a beneficiary (and these shares are held by a non-discretionary nominee), the person would not be required to disclose a change if it then takes those shares out of the nominee account and holds the shares directly itself.
 - In Article 18(2), there is a need to clarify the interpretation of the "financial institution".
- Other issues
 - The Transparency Directive requires companies listed on regulated markets to make public their audited financial statements within 4 months of financial year end. However, if there was a disruption in the supply of audit services, for instance, along the lines of Andersen Accounting, some listed companies could be unable to contract an auditor in time to lodge audited accounts within this timeframe. Therefore, the Commission should consider whether a clause might be added to the directive to allow companies additional time to publish the audited accounts should there be a major disruption to the audit market.
 - It would be useful to clarify the relationship between Article 8 of the Prospectus Directive, which gives the competent authority the ability to authorise the omission of certain information from a prospectus, and the Transparency Directive provisions under Articles 4 and 5.
 - Solutions should be provided regarding the way dividend information is given by issuers to the market. ESMA should require issuers to follow some basic rules regarding disclosure of dividend information. This reply identifies such rules.
 - Some respondents favoured lowering the initial threshold for disclosure of major holdings at 3%. But one respondent was explicitly not in favour of lowering such initial disclosure threshold to 3%. If this were done, there should be an exemption for regulated investment managers that do not invest for control.
 - One respondent explained that if the current system of more stringent and additional rules prevailed, it would be essential to give at least a facilitated access to centralized (and regularly updated) information to any shareholder on the mechanisms existing in the 27 Member States in order to facilitate the life of the investors. Currently, it is really a burden for shareholders investing all over

Europe to find in each Member State, in addition to the total number of the issuer voting rights, the threshold to declare, the way of notifying it, the deadline for notification, the addressee and the consequences of a lack of notification. The complexity and the difficulty to find information on the above matters can be considered as an obstacle to invest in Europe while it seems important to preserve the attractiveness of the Single Market. Furthermore, some countries, like France, allow companies to insert in their articles of incorporation specific thresholds which the investors will have to find out also.

- Article 17 of the Transparency Directive should be reviewed in the light of Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies.
 - Article 19(1) (2nd paragraph) should be deleted: this article requires an issuer to communicate any amendment of its instrument of incorporation or statutes to the competent authority. This requirement may result in some confusion about the role of the competent authority. CESR proposes to abolish this requirement in order to reduce administrative burden for issuers. The Shareholders' Rights Directive already requires issuers having shares admitted to trading on a regulated market to make the proposal and the invitation to general meeting of shareholders publicly available. Moreover, although the Shareholders' Rights Directive does not apply to issuers having only other securities than shares admitted to trading on a regulated market, the Market Abuse Directive requires also these issuers to disclose information relating to the issuer which is likely to have a significant effect on the price of the securities admitted to trading.
 - There is a need to harmonise the rules regarding "equivalence" for third country issuers in the Transparency Directive (Article 23) and the corresponding rules in the Commission Directive 2007/14.
- Reference is made to the replies made to CESR consultation in 2007.
 - In addition to the issues mentioned by the various respondents (including CESR), CESR raised the following specific issues:
 - Definition of regulated information: CESR notes that currently some information required to be disclosed by listed companies, especially in relation to corporate governance and shareholders' meetings, is classified as regulated information in some Member States whereas it is not regulated information in others. In order to achieve further harmonisation it should be considered whether these disclosures should be classified as regulated information throughout the EU.
 - Definition of an issuer: It seems that in some Member States there are issuers other than legal persons with securities admitted to trading on regulated markets. The definition of an issuer should therefore be aligned with the situation.
 - Communication of choice of home Member State: It should be considered whether Article 2 of the implementing Directive would need to be amended so that EU issuers would also be required to communicate the choice of home Member State to the competent authority of the Member State where the issuer has its registered office (if different).

- Possibility for binding standards on supervision of financial information: Article 24(4)(h) lays out the general power of competent authorities to examine whether information referred to in the Transparency Directive is drawn up in accordance with the relevant reporting framework and to take appropriate measures in case of discovered infringements. The rule is the foundation for supervision of application of IFRS standards in financial statements. CESR has issued two standards relating to supervision of financial information. In order to ensure consistent supervision of financial information throughout the EU it should be considered whether the proposed European Securities Markets Authority could propose binding technical standards on this issue.
- Relationship between the Transparency Directive and the Market Abuse Directive: There seem to be some inconsistencies between these two Directives (and their implementing measures) especially in terms of disclosure mechanisms. CESR therefore considers that these inconsistencies should be further analysed and abolished in connection with the review of the Directives.